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TEAM
TREASURY FOR TFFC, TFI

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SUBJECT: EU TERRORISM FINANCE LISTINGS: TROUBLE AHEAD

SUMMARY AND INTRODUCTION

¶1. (SBU) EU and Member State courts are rendering judgments that may hinder our ability to secure EU-wide designations of terrorist entities. The new problem for us is higher standards of evidence, and judicial review of the sufficiency of that evidence, that will make the EU and its Member States less responsive to our requests for terrorist designations and accompanying asset freezes. As we pursue the valuable foreign and security policy tool of terrorist designations, we may need to ramp up our intelligence sharing on terrorist entities against which we seek EU action. These cases are already having some spillover effect on Council decision-making for all sanctions programs, not just counter-terrorism.

¶2. (U) Terrorist designations in the EU framework can follow along several possible paths. All are important to us. First is the UNSCR 1267 process, by which UN-level terrorism sanctions stemming from UNSCR 1267 and related resolutions regarding Usama bin Laden, al-Qaeda, and the Taliban are implemented directly on an EU basis. (This process is legislated by the EU's May 2002 Common Position 2002/402/CFSP, February 2003 Common Position 2003/140/CFSP, and May 2002 Council Regulation 881 2002.) The second is the UNSCR 1373 process, by which the EU makes autonomous designations of terrorists for EU-wide sanctions. Some individual EU Member State designations follow from national laws. Others rely on the EU-wide authorities cited above to stand in for a lack of corresponding national authorities.

¶3. (SBU) On December 4, 2008, the EU's Court of First Instance in Luxembourg struck the Mujahideen-e Khalq (MEK) from the EU's terrorist designation list for asset freezing. This marked the third time the court has annulled an EU Council decision freezing the funds of the MEK. The Court found that the EU Council had violated the rights of the MEK by adopting the decision without first informing the MEK of the new information or new material in the file which, according to the Council, justified maintaining it on the EU list of terrorist organizations. The Court further found that the Council violated the rights of the MEK by refusing to communicate to the Court certain information about the case, and

that in doing so, the Council had also infringed upon the MEK's fundamental rights to judicial protection.

¶4. (SBU) The MEK decision comes in the context of other judicial decisions on the terrorist financing designation programs, including the UNSCR 1267-related Kadi and al-Barakaat cases. The latter turned in part on the principle that terrorism-related UN Security Council Resolutions do not preempt the EU judiciary's own interpretations of due process and fundamental rights. Further, the EU judiciary will determine whether the EU Member State national laws comply with Community law. The court in the MEK case also announced that in order to ensure the protection of fundamental rights of any listed person or entity, the court would need to determine the sufficiency of evidence supporting the designation by reviewing certain materials, including classified materials, upon which the Council had relied. Taken together, the strands of these decisions suggest that: (a) EU terrorist designations will be subject to higher standards of proof of terrorist-related activity, and (b) courts, and not simply national governments, may demand to see this evidence. Most importantly, when the U.S. wants the EU to designate given terrorist entities, we need to understand that we may not succeed unless our follow-up action meets these newly evolving, and tougher, standards for terrorist asset freezes. End Summary and Introduction.

The MEK Case

¶5. (SBU) On December 4, 2008, the European Union's Court of First Instance (CFI) annulled the EU Council's July 15, 2008 designation of the organization under the Council Decision 2008/583/EC. The

Court's decision will in effect remove MEK from the EU's autonomous terrorist designations list for asset freezing, as it is highly unlikely the EU will find a new basis for listing when the designations are due for renewal by end the of January. The court declined to issue guidance on the effective date of the annulment of the MEK's asset freeze, leaving it to each Member State to decide for itself when to release funds. The court ruled that:

--The Council had violated the MEK's rights of defense (for failing to communicate the new information that justified its listing), and the Council's refusal to share with the Court "certain information about the case" had infringed the MEK's "fundamental right . . . to effective judicial protection."

The judgment upheld three of the MEK's six pleas in law, as plaintiff contesting the asset freeze. These pleas were that the EU Council violated the MEK's rights in:

--breaches of two national statutes and a failure to discharge burden of proof;

--breach of the plaintiff's right to judicial review; and

--breach of the rights of the defense and of the obligation to give reasons for a decision.

(We note here that the Mujahideen-e Khalq or MEK is also known as the People's Mojahedin Organization of Iran or PMOI, and other names as well. We refer to the organization in this message by the U.S.-recognized initials of "MEK." In fact, the text of the Court's decision referred to the organization as the PMOI.)

¶6. (SBU) The December 4 MEK decision was a lengthy and complex set of rulings by the Court of First Instance. The decision drew on interpretations of both fact and law. It addressed not only the EU Council designation process, but also some underlying designation actions by the UK and French governments taken on the basis of their own national laws. The decision spoke to the interplay between EU member state national laws and EU law on terrorist designations. We highlight below what we see as the most substantively important rulings from a counter-terrorism policy standpoint.

-- Perhaps most significantly, the CFI ruling asserts that "the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorize its communication to the Community judicature whose task is to review the lawfulness of that decision." Thus, EU courts may ask to see the evidence, however classified, of terrorist linkages before upholding any designation.

-- The CFI judges expressed concern over the information taken from the French prosecutor, questioning whether it qualified as a decision by a competent national authority. Embedded in this and other cautions in the MEK decision were repeated assertions that EU listings based on flawed national listings would not be upheld in an EU court.

-- The CFI's Presiding Judge Nicholas Forwood focused on the difference between group versus individual behavior. The MEK, not being a legal person, could not be subject to criminal proceedings. He questioned the freezing of assets of all alleged MEK associates, given that individuals may act differently than the intentions of the group. Forwood noted that MEK had declared a ceasefire in 2002, and questioned whether any other European investigations and prosecutions had been initiated, or convictions had been entered against either the MEK or its alleged members. (Comment: We find such detailed judicial consideration of what constitutes involvement in terrorism an ominous sign for future EU listings, particularly in looking for prosecutions or convictions, which of course require a very high burden of proof, to test the sufficiency of a terrorist designation. The decision noted that the Court cannot substitute its own assessment for that of the Council on what constitutes

terrorism, but the Court can decide whether the evidence at hand substantiates the conclusion, i.e., involvement in terrorism, drawn from that evidence. End Comment.)

-- The decision held that the MEK's rights of defense, or due process, were breached when the EU Council retained the MEK on its asset-freeze list without offering the MEK an opportunity to contest recently-developed information that was used by the Council in its decision.

¶7. (SBU) The EU Council must decide by early February (simple majority) whether to appeal the CFI ruling to the higher court, the European Court of Justice (ECJ). France may decide on its own whether to appeal. The Council, in deciding whether or not to appeal, must weigh the risks of tempting the higher court to go even further than the lower court to find the Council had in fact abused its powers (as warned by the CFI judgment) and that the terrorist designation process is fundamentally flawed. EU Member States will need to discuss their views on EU court judicial review of nationally-designated classified information. The EU is already concerned with implications for future designations, and their concern is not limited to just the counter-terrorism sanctions regimes.

¶8. (SBU) No EU court case has ever fully examined the substantive merits of a terrorist designation -- only the decision-making process. The CFI's December 4 decision on the MEK clearly signals this court's interpretation that it has an obligation to undertake substantive reviews. The court in MEK, however, does not define the standard by which the Council's decision will be tested. As one EU legal expert explains, their best guess on the court's standard derives from the first and original MEK case judgment of December 12, 2006. (The MEK case decision discussed here is actually the third to have come before an EU court.) If the U.S. and EU courts ultimately take different approaches to the legal standard for our respective designations, we can expect some divergence in our overall sanctions policy and implementation, and thus some complications for promoting an effective multilateral sanctions regime.

The Kadi and al-Barakaat Cases

¶9. (U) On September 3, 2008 the European Court of Justice (ECJ) issued a joint judgment on the appellant cases of Yassin Abdullah Kadi and al-Barakaat International Foundation. Kadi and al-Barakaat were two designations made under EU law pursuant to UNSCR 1267-related counterterrorism sanctions. The ECJ ruled that Kadi and Al Barakaat's "rights of the defense, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected." The Court in effect rejected the idea that UN law had a "generalized immunity from jurisdiction within the internal legal order of the Community."

¶10. (U) The ECJ found that, "the Community judicature must, in accordance with the powers conferred on it by the European Community Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations. The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of Kadi and 263 to 282 of Yusuf and Al Barakaat, that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens."

¶11. (SBU) We anticipate that the December 2008 MEK ruling, combined with the implications of the September 2008 Kadi and Al Barakaat ruling, could lead EU courts to take up more substantive judicial review of EU follow-up to UN sanctions decisions. Ample opportunities for such an event may arise in the coming weeks to months. On January 21 the CFI will hear the next UNSCR 1267-related EU judicial challenge brought by Omar Mohammed Othman. Kadi and Al Barakaat are expected to launch new challenges against their November 28, 2008 re-designation by the EU. Other upcoming 1267-related cases include Al-Bashir Al-Faqih, Sanabel Relief Agency Ltd., Ghunia Abdrabbah, Taher Nasuf, Faraj Hassan, and Chafiq Ayadi.

IMPLICATIONS AND QUESTIONS FOR THE USG

Spillover for Other Sanctions

¶12. (SBU) The December 4 decision on the MEK is the first EU terrorist financing ruling to flat-out require a sharing of classified information in order to support the Court's substantive judicial review of the basis for designation. The EU Council $ecretariat will try to discourage drawing implied linkages to the other sanctions regimes, but this is clearly in several Member States' minds with regard to future designations related to Iran, Zimbabwe, Burma, and other sanctions regimes.

Impact on U.S. Efforts to Fight Terrorism

¶13. (SBU) If one assumes that the CFI's new requirements in the MEK decision could extend to third party-proposed designations, not just those proposed by EU member states, there are implications for USG proposals to the EU for listings and terrorist sanctions. We must confront the possibility that working with the Council on designations may entail enabling the EU court to access unclassified or even classified information to review the legality of the EU listing by a standard yet to be fully determined. This ruling may be construed to affect both the autonomous (UNSCR 1373) and UN-level

(UNSCR 1267) listings.

¶14. (SBU) One channel to explore for mitigating the above risks would be the U.S.-EU classified information-sharing agreement. This agreement is known formally as the "Security Arrangement between the EU Council General Secretariat Security Office (GSCSO) and the European Commission Security Directorate (ECSD) and the United States Department of State for the Protection of Classified Information Exchanged between the EU and the United States of America." Assuming the U.S. classified material necessary to support an EU designation decision is not amenable to declassification, the agreement could perhaps be used to facilitate information sharing and provision of evidence in the event of anticipated EU judicial challenges. However, the Council itself does not yet have a consensus view on whether its own classified information can be shared with the EU courts.

¶15. (SBU) If the U.S. and EU courts ultimately take different approaches to the legal standard for our respective designations, and to the level of deference due the executive's decision, we can expect some divergence in our overall sanctions policy and implementation, and thus some complications for promoting an effective multilateral sanctions regime. We are already sensing, as reported elsewhere, some falling off in the aggressiveness of UK prosecutors to seek terrorist designations.

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